



ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA-R02-OAR-2021-0572, FRL-9439-02-R2]

Approval and Promulgation of Implementation Plans; New York; Ozone and Particulate Matter Controls Strategies

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is approving several revisions to the New York State Implementation Plan (SIP) meant to result in emission reductions that will help attain and maintain the national ambient air quality standards (NAAQS) for particulate matter (PM) and ozone. These SIP revisions consist of amendments to several existing regulations outlined within New York's Codes, Rules, and Regulations that implement control measures for sources of PM and oxides of nitrogen (NO_x). These actions are being taken in accordance with the requirements of the Clean Air Act (CAA).

DATES: This final rule is effective on [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: The EPA has established a docket for this action under Docket ID Number EPA-R02-OAR-2021-0572. All documents in the docket are listed on the <https://www.regulations.gov> website. Although listed in the index, some information is not publicly available, *e.g.*, Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the internet and will be publicly available only in hard copy form. Publicly available docket materials are available electronically through <https://www.regulations.gov>.

FOR FURTHER INFORMATION CONTACT: Fausto Taveras, Environmental Protection Agency, Region 2, Air Programs Branch, 290 Broadway, New York, New York 10007-1866, at (212) 637-3378, or by email at Taveras.Fausto@epa.gov.

SUPPLEMENTARY INFORMATION: The supplementary information section is arranged as follows:

- I. What is the background for these actions?
- II. What comments were received in response to the EPA’s proposed action?
- III. What action is the EPA taking?
- IV. Incorporation by Reference
- V. Statutory and Executive Order Reviews

I. What is the background for these actions?

On January 28, 2022, the EPA published a Notice of Proposed Rulemaking that proposed to approve revisions to the New York SIP submitted by the State of New York on February 3, 2021 and October 15, 2020. *See* 87 FR 4530. The SIP revisions include adopted revisions to three regulations, Title 6 of the New York Code of Rules and Regulations (NYCRR), Part 219, “Incinerators”, and Part 222, “Distributed Generation Sources”, with state effective dates of March 14, 2020, and March 25, 2020, respectively. New York also submitted attendant revisions to Part 200, Section 200.9, “General

Provisions, Referenced material”. These revisions are applicable statewide, with the exception of Part 222 which will only be applicable to sources located within the New York Metropolitan Nonattainment Area (NYMA).¹ These revisions include additional control strategies that will reduce NO_x and PM emissions from major sources throughout the State. The EPA is approving New York’s SIP submittals listed within this action as a SIP-strengthening measure for New York’s ozone and PM SIP. The EPA is also approving New York’s SIP submittal since it incorporates additional RACT/RACM rules for NO_x at Municipal and Private Solid Waste Incineration Units.

The specific details of New York’s SIP submittals and the rationale for the EPA’s approval action are explained in the EPA’s proposed rulemaking and are not restated in this final action. For this detailed information, the reader is referred to the EPA’s January 28, 2022, proposed rulemaking. *See id.*

II. What comments were received in response to the EPA’s proposed action?

In response to EPA’s January 28, 2022 proposed rulemaking on New York’s SIP revisions, the EPA received three comments during the 30-day public comment period. The specific comments may be viewed under Docket ID Number EPA-R02-OAR-2021-0572 on the <https://regulations.gov> website.

Comment 1 & 2

Two public comments received on February 14, 2022, were submitted by one anonymous commenter. Both comments are substantially similar and support the EPA’s proposed approval of New York’s SIP revisions. Both comments state that the revisions to 6 NYCRR Part 219 and Part 222 are necessary to, “... make sure that an increase in PM and NO_x emissions are avoided.” However, both comments also urge the EPA to reevaluate the Ozone levels outlined in the 2008 and 2015 Ozone NAAQS due to the

¹ The New York portion of the NYMA, is composed of the five boroughs of New York City and the surrounding counties of Nassau, Suffolk, Westchester, Rockland and the Shinnecock Indian Nation. *See 40 CFR 81.333.*

ever-changing environment and the growing population in the NYMA.

Response 1 & 2

The EPA acknowledges the commenter's support of the EPA's proposed rule. The EPA also recognizes the commenter's request for the EPA to reevaluate and revisit the Ozone levels outline within the 2008 and 2015 Ozone NAAQS. While this issue is outside the scope of the present action, we note that on December 23, 2020, the EPA announced a decision to retain, without changes, the 2015 Ozone NAAQS (December 23, 2020 Decision). *See* 85 FR 87256. However, on October 29, 2021, the EPA announced that it will reconsider the December 23, 2020 Decision.²

Comment 3

The Midwest Ozone Group (MOG) submitted comments on February 28, 2022, that urged the EPA to require New York to impose all emission controls for Distributed Generation Sources (DG Sources) units by 2023, instead of the adopted 2025 final phase year. MOG stated that a 2023 implementation timeframe will be consistent with the nonattainment obligations of the NYMA. MOG also provided details on how NO_x emissions from New York's DG Sources adversely impact upwind states like Connecticut and argued that the EPA's proposed approval fails to recognize the impact on those upwind states and the Good Neighbor Provisions of the Clean Air Act. In addition, MOG provided the following comments, and extensive details for each, as follows:

1. EPA has recognized the critical need to regulate NO_x emissions from DG Sources units.

2. In 2023, the only remaining ozone NAAQS nonattainment monitors in the Northeast are located in the Connecticut portion of the NYMA.

² *See*, <https://www.epa.gov/ground-level-ozone-pollution/epa-reconsider-previous-administrations-decision-retain-2015-ozone>.

3. It has been well-established that residual nonattainment in Connecticut and the NYMA is being caused by sources that include DG Sources units in New York.

4. EPA should not allow New York to delay the implementation of those controls beyond the moderate nonattainment date for the 2015 ozone NAAQS.

MOG's comment letter also included: (1) Presentation slides distributed by the EPA on the analysis of ozone trends in the east in relation to interstate transport, (2) and a data analysis presentation conducted by the Stationary and Area Source Committee on high emitting Electric Generating Units during High Electric Demand Days throughout states within the Ozone Transport Region. MOG referred to these attachments in its comments on EPA's proposed action.

Response 3

In this action, EPA is approving New York's rules into the state's SIP as a SIP strengthening measure. This action is not intended to satisfy specific nonattainment planning obligations under the Clean Air Act. Rather, EPA is approving these New York regulations into the SIP pursuant to CAA section 110(k)(3), which states that EPA "shall approve [a SIP] submittal as a whole if it meets all the applicable requirements of this chapter." Because this SIP revision relates to criteria pollutants and strengthens the preexisting requirements in the New York SIP, EPA has determined it is appropriate to approve the SIP revision.

EPA finds no basis, and the commenter has not provided one, to disapprove New York's submittal solely on grounds related to the timing of the regulations at issue in relation to the attainment dates. There are multiple separate nonattainment obligations that apply to New York pursuant to subpart 2 of part D of title I of the CAA, including requirements related to ensuring nonattainment areas attain the NAAQS by the applicable attainment date. EPA acknowledges that the State of New York has unmet attainment planning obligations for the NYMA nonattainment area. The EPA makes no finding in

this action that New York has satisfied those obligations and does not make any finding as to whether the regulations approved through this action would be sufficient to meet separate nonattainment planning obligations. EPA action on any SIP revision submitted by New York to meet nonattainment planning requirements would be a separate rulemaking with an opportunity for public comment.

The EPA considers comments related to interstate transport obligations under CAA section 110(a)(2)(D)(i)(I) to be beyond the scope of this action. The EPA's actions addressing interstate transport under the 2008 and 2015 ozone NAAQS are separate rulemakings with their own comment periods and the separate availability of judicial review. The EPA will not address comments in this action that are unrelated to this action.

The EPA also reviewed NYSDEC's SIP revision to examine if similar comments were presented during the department's assessment of public comments for the proposal of Part 222. Representatives from energy management and sustainable energy organizations each submitted comments that requested NYSDEC to provide additional justification for why DG Sources need to be considered an economic dispatch source to be subject to the control requirements in Part 222. The commentors questioned why the adopted rule would not apply to distributed generation sources that provide electricity to power equipment or structures not served by distribution utilities and stated that these DG Sources not connected to the electrical grid could run fossil fuel-fired generators without any restrictions under Part 222. NYSDEC responded to the comments by stating that the purpose of Part 222 is to address and reduce emissions from emergency engines used in non-emergency applications, which include DG Sources classified as economic dispatch sources. Within NYSDEC's SIP revision of Part 222, the department also stated that sources that are not connected to the grid, which are not subject to Part 222, will be subject to 6 NYCRR Part 201, "Permits and Registrations".

NYSDEC also stated that it consulted with stakeholders including the New York Independent System Operator (NYISO), to develop a rule that improves air quality while maintaining a reliable electric grid. Therefore, NYSDEC chose the 2021 and 2025 timeframes to strike a balance in improving air quality and maintaining electric grid reliability. NYSDEC also factored in the time for owners or operators applicable to Part 222 to replace their DG Sources with sources that are at least model year 2000 or retrofit their sources with the required control technology. NYSDEC also factored in the time demands for permitting requirements and emission testing and believes that the compliance schedule in the regulation is appropriate.³ The 2025 timeframe builds upon and parallels existing protections in other New York regulations applicable to DG Sources. NYSDEC also chose the 2025 timeframe since most sources subject to Part 222 will also have to comply with the emission provisions outlined in Section 24-149.6 of the New York City Air Pollution Code.⁴ Starting on January 1, 2025, stationary engines applicable to Section 24-149.6 must also demonstrate compliance with the EPA's Tier IV emissions standards set forth in 40 CFR Part 60, Subpart III, "Standards of Performance for Stationary Combustion Ignition Internal Combustion Engines". NYSDEC also stated that sources that are not connected to the grid, and are not subject to Part 222, will be subject to 6 NYCRR Part 201, "Permits and Registrations". The revisions made to Part 222 impose emission limits and control technology requirements onto emergency engines located within the NYMA, which are sources not currently regulated under Title 6 NYCRR Subpart 227-2, "Reasonably Available Control Technology (RACT) for Major

³ Under 6 NYCRR Part 222, applicable owners or operators of a DG source that will operate as an economic dispatch source must notify NYSDEC by March 15, 2021, or 30 days prior to operating the source, whichever is later. In addition, emission test reports demonstrating compliance with the 2025 emission limits of Part 222 must be submitted and approved by the Department before a distributed generation source may be operated as an economic dispatch source on or after May 1, 2025.

⁴ Title 24, Chapter 1, Subchapter 6, Section 24-149.6 of New York City's Administrative Code outlines emission control provisions for certificated stationary combustion compression ignition internal combustion engines operating within New York City. See, <https://www1.nyc.gov/assets/dep/downloads/pdf/air/air-pollution-control-code.pdf>.

Facilities of Oxides of Nitrogen (NO_x)”. The 2021 and 2025 timeframe provides time for owners or operators of applicable DG Sources to retire older units and implement control technologies, while maintaining the reliability of the electric grid. NYSDEC also states within its SIP revision that a regulatory strategy to address emissions from DG Sources not subject to Part 222 or Subpart 227-2 may be addressed through a separate rulemaking effort.

NYSDEC has also revised Part 222 to add subdivision 222.4(c), which establishes up to a two-year extension to the 2021 and 2025 compliance dates in cases where owners or operators can provide evidence, such as contracts, to demonstrate that they intend to meet the emission limits set forth in section 222.4(b) (control requirements) as expeditiously as practicable, but no later than April 30, 2027.

This concludes our response to the comments received. No changes have been made to the proposed rule as a result of the comments received.

III. What action is the EPA taking?

The EPA is approving as SIP strengthening measures New York’s SIP revision submittals, dated February 3, 2021, and October 15, 2020, for the purpose of incorporating the revisions made to 6 NYCRR Subpart 219, “Incinerators”, and 6 NYCRR Part 222, “Distributed Generation Sources”, with a state effective date of March 14, 2020, and March 25, 2020, respectively. The EPA is also approving the attendant revisions made to Part 200, Subpart 200.9, “General Provisions, Referenced material”. The EPA evaluated New York’s submittals for consistency with the Clean Air Act, EPA regulations, and EPA policy. The EPA finds that these submissions strengthen New York’s Ozone and PM SIPs.

IV. Incorporation by Reference

In this document, the EPA is finalizing regulatory text that includes incorporation by reference. In accordance with requirements of 1 CFR 51.5, EPA is finalizing the

incorporation by reference of 6 NYCRR Part 200, Subpart 200.9, “General Provisions, Referenced material”, Part 219, “Incinerators”, and Part 222, “Distributed Generation Sources”, as described in Section I of this preamble and set forth below in the amendments to 40 CFR part 52. The EPA has made and will continue to make these materials generally available through <https://regulations.gov> and at the EPA Region 2 Office (please contact the person identified in the **FOR FUTHER INFORMATION CONTACT** section of this preamble for more information). Therefore, these materials have been approved by EPA for inclusion in New York’s SIP, have been incorporated by reference by EPA into that SIP, and are fully federally enforceable under sections 110 and 113 of the CAA as of the effective date of the final rulemaking of EPA’s approval, and will be incorporated by reference in the next update to the SIP compilation.⁵

V. Statutory and Executive Order Reviews

Under the Clean Air Act, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable Federal regulations. *See* 42 U.S.C. 7410(k); *see also* 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA’s role is to approve state choices, provided that they meet the criteria of the Clean Air Act. Accordingly, this action merely approves state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this final action:

- Is not a significant regulatory action subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993), and 13563 (76 FR 3821, January 21, 2011);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);

⁵ 62 FR 27968 (May 22, 1997)

- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Public Law 104-4);
- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the Clean Air Act; and
- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, the SIP is not approved to apply on any Indian reservation land or in any other area where EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. In those areas of Indian country, the rule does not have tribal implications and will not impose any substantial direct costs on tribal governments or preempt tribal law as specified by Executive Order 13175 (65 FR 67249, November 9, 2000).

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller

General of the United States. EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the *Federal Register*. A major rule cannot take effect until 60 days after it is published in the *Federal Register*. This action is not a “major rule” as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2)).

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Nitrogen Dioxide, Intergovernmental Relations, Incorporation by Reference, Ozone, Particulate matter, Reporting and recordkeeping requirements, Waste treatment and disposal.

Authority: 42 U.S.C. 7401 *et seq.*

Lisa Garcia,
Regional Administrator,
Region 2.

For the reasons set forth in the preamble, 40 CFR part 52 is amended as follows:

**PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION
PLANS**

1. The authority citation for part 52 continues to read as follows:

Authority: 42 U.S.C. 7401 *et seq.*

Subpart HH – New York

2. In § 52.1670 paragraph (c) is amended in the table by revising entries “Title 6, Part 200, Subpart 200.9”, “Title 6, Part 219”, and “Title 6, Part 222” to read as follows:

§52.1670 Identification of plan.

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(c) * * *

EPA-APPROVED NEW YORK STATE REGULATIONS AND LAWS

State citation	Title/subject	State effective date	EPA approval date	Comments
* * * * *				
Title 6, Part 200, Subpart 200.9	General Provisions, Referenced material	3/25/20	[insert date of publication in the Federal Register]	<ul style="list-style-type: none">• EPA is approving referenced materials that previously were not Federally enforceable.• EPA approval finalized at [insert Federal Register citation].
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Title 6, Part 219	Incinerators	3/14/20	[insert date of publication in the Federal Register]	<ul style="list-style-type: none">• EPA approval finalized at [insert Federal Register citation].

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Title 6, Part 222	Distributed Generation Sources	3/25/20	[insert date of publication in the Federal Register]	• EPA approval finalized at [insert Federal Register citation] .
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[FR Doc. 2022-11571 Filed: 6/1/2022 8:45 am; Publication Date: 6/2/2022]